Supreme Court of the United States

October Term, 1977

No. 77-1399

MECHANIC'S BUILDING AND LOAN COMPANY,
Petitioner,

vs.

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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MECHANIC'S BUILDING AND LOAN COMPANY,
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FEDERAL HOME LOAN BANK BOARD, *et al.*,[1]
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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner, Mechanic's Building and Loan Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment rendered by that Court in Case No. 76-1886, entitled *Mechanic's Building and Loan Company, Plaintiff-Appellant v. Federal Home Loan Bank Board, et al., Defendants-Appellees,* and entered on January 4, 1978.

1. The full caption for the instant case is: Mechanic's Building and Loan Company, Mansfield, Ohio, Petitioner, v. Federal Home Loan Bank Board, Cincinnati, Ohio; Lawrence B. Muldoon, Supervisory Agent; Federal Home Loan Bank Board, Washington, D.C.; Thomas R. Bowmar, Individually and as Chairman of the Federal Home Loan Bank Board; Garth Marson, Individually and as a member of the Federal Home Loan Bank Board; Grady Perry, Jr., Individually and as a member of the Federal Home Loan Bank Board; and Cardinal Federal Savings and Loan Association of Cleveland, Ohio, Formerly known as West Side Federal Savings and Loan Association, Respondents.

OPINIONS BELOW

The memorandum decision of the United States District Court for the Southern District of Ohio, granting Respondent's motion for summary judgment appears in the Appendix at page A4 and the entry of the judgment of that Court appears in the Appendix at page A3. The decision and judgment of the United States Court of Appeals for the Sixth Circuit appears in the Appendix at page A1.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on January 4, 1978.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Petitioner sought the judicial review of a decision by the Federal Home Loan Bank Board pursuant to 5 U.S.C. § 702. In an effort to put before the Court the "whole administrative record" petitioner attempted in accordance with Rule 34 of the Federal Rules of Civil Procedure to discover certain staff records, opinions, summaries, recommendations and memoranda used by the Federal Home Loan Bank Board ("Board") in making its decision. The Board refused to disclose the documents claiming they were privileged. The District Court adopted the Board's position and proceeded to review the administrative action of the Board without the benefit of these documents.

The Court of Appeals affirmed. The questions presented are:

1. Whether the whole administrative record required by this Court to be reviewed pursuant to 5 U.S.C. § 706 includes the staff records, opinions, recommendations, summaries and memoranda used by the Federal Home Loan Bank Board in making a decision to permit the establishment of a branch savings and loan association.

2. Whether the District Court can conduct a "thorough, probing, in depth review" of the action of the Federal Home Loan Bank Board in granting permission to establish a branch savings and loan association without examining all the factors and information that were considered by the Board in making its decision.

3. Whether a "rational basis" exists for a decision of the Federal Home Loan Bank Board to permit the establishment of a branch savings and loan association when the record reviewed contains no probative, independent evidence to support the decision and the Board does not provide reasons for the decision.

CONSTITUTIONS AND STATUTES INVOLVED

This case presented questions arising under the guarantee against deprivation of property rights without due process of law contained in the Fifth Amendment to the Constitution of the United States. Other issues in the instant case arose under various sections of the Administrative Procedure Act (5 U.S.C. § 701, *et seq.*), particularly 5 U.S.C. § 702, 5 U.S.C. § 704, and 5 U.S.C. § 706, which appear in the Appendix at page A20.

STATEMENT OF THE CASE

On April 6, 1973, the West Side Federal Savings and Loan Association of Fairview Park, Ohio ("West Side") filed an application with the Federal Home Loan Bank Board ("Board") to establish a branch savings and loan office near the intersection of U.S. Route 30 and Lexington-Springmill Road in Ontario, Richland County, Ohio. Mechanic's Building and Loan Company of Mansfield, Ohio ("Mechanic's") and other area savings and loan associations filed protests against West Side's application, and, on October 29, 1973, the Board denied the application.

On December 31, 1973, West Side and Second Federal Savings and Loan Association of Cleveland, Ohio, merged to form Cardinal Federal Savings and Loan Association ("Cardinal") thus becoming the largest federal savings and loan association in the State of Ohio. On September 27, 1974, Cardinal filed with the Board another application to establish a branch office at the same location in Ontario, Ohio. Once again Mechanic's and other area savings and loan associations protested the application. Upon determining that the opposition to the Cardinal application was substantial, the Board held a hearing for oral argument on January 9, 1975, in Cincinnati, Ohio. There Mechanic's argued, among other things, that the circumstances surrounding the application had not changed substantially since the Board's denial of the first application in 1973, and that, consequently, the application of Cardinal should be denied.

On March 12, 1975, the Board approved Cardinal's application pursuant to Board Resolution No. 75-258. The Board's Resolution appears in the Appendix at page A19. Notice of the approval was issued by the Board to all interested savings and loan associations on March 24, 1975.

Pursuant to 5 U.S.C. § 702 of the Administrative Procedure Act, Mechanic's filed its complaint in the United States District Court for the Southern District of Ohio, against the Board, various agents of the Board, and Cardinal in an effort to obtain judicial review of the Board's decision. Mechanic's asserted that the decision of the Board was unreasonable, arbitrary, capricious, and discriminatory and violative of various rights guaranteed to Mechanic's by the Constitution of the United States. Further, Mechanic's asserted that the Board had not established reasonable standards for determining need for a branch, prospective usefulness of the facility, and absence of undue injury to other area banking institutions, as required by 12 U.S.C. § 1464. In the alternative, Mechanic's asserted as well that even if the Board had established such standards, the Board had discriminated against Mechanic's by failing to disclose such standards. Finally, Mechanic's asserted that the Board's decision was in violation of its regulations, contrary to law, and unsupported by substantial evidence, and requested a temporary injunction or restraining order to prevent irreparable injury to Mechanic's.

On June 27, 1975, the District Court granted a preliminary injunction preventing Cardinal from permanently establishing the Ontario branch. However, Cardinal was permitted to open a temporary trailer-type office on the branch location.

On September 10, 1975, Mechanic's filed a motion, pursuant to Rule 37 of the Federal Rules of Civil Procedure, for an order of the Court requiring that certain documents be produced and that a complete and full record of the administrative procedures be made available to Mechanic's and to the Court. Mechanic's stated in its motion, and briefs in support thereof, that certain staff records,

opinions, recommendations and memoranda had been used by the Board in formulating its approval of Cardinal's application. Mechanic's had requested that the Board make these materials a part of the record and available to Mechanic's and the Court, pursuant to Rule 34 of the Federal Rules of Civil Procedure. The Board, however, refused, claiming that the materials were privileged and therefore not subject to review. Mechanic's argued that review of the administrative record could not be effective unless the entire record and all matters which were considered by the Board in reaching its decision were before the Court; that is, Mechanic's asserted that the Court could not properly determine whether the Board's action was arbitrary, capricious, and unlawful unless it had access to the "whole record", as required in 5 U.S.C. § 706.

A magistrate of the District Court denied Mechanic's motion to produce on November 12, 1975, on the grounds that he felt that the documents in issue were irrelevant and privileged. The decision and order of the magistrate appears in the Appendix at page A14. Subsequently, Mechanic's moved the Court to reconsider the decision of the magistrate. However, the District Court judge affirmed the magistrate's decision and, at the same time, dissolved the temporary injunction which had been granted to Mechanic's at the opening of the action. Further, the District Court refused to certify an interlocutory appeal requested pursuant to 28 U.S.C. § 1292 (b). The order on these issues was filed on January 5, 1976 and appears in the Appendix at page A12.

Following the issuance of these orders, the District Court considered motions for summary judgment which had been filed by the Board on July 29, 1975, and by Cardinal on September 12, 1975, as well as the cross-motion for summary judgment filed by Mechanic's on Feb-

ruary 6, 1976. Oral arguments were heard on the motions on April 14, 1976, whereupon the Court granted the Board's and Cardinal's motions. The memorandum opinion of the District Court and the entry of judgment are found in the Appendix at pages A4 and A3 respectively.

On May 14, 1976, Mechanic's filed its notice of appeal with the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1291. Oral argument was heard on December 14, 1977. Mechanic's argued that the District Court was not furnished with the "whole" administrative record as required by 5 U.S.C. § 706, that Mechanic's was substantially prejudiced by the District Court's decision precluding Mechanic's from discovering the undisclosed documents, and that the Board's approval of Cardinal's application was arbitrary, capricious, abusive of discretion, and not properly founded in fact or in accordance with law. On January 4, 1978, the Court of Appeals affirmed the decision of the District Court by its order, which appears in the Appendix at page A1.

Petitioner, Mechanic's Building and Loan Company, now seeks review of the order of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

During the five year period from 1970 to 1975, the number of savings and loan branches in the United States more than doubled. In 1972, branch savings and loan offices exceeded the number of main offices for the first time.[2]

This increase in savings and loan branches has created a need to review carefully the procedure by which these branches are established and especially the standard of judicial review that is provided in accordance with 5 U.S.C. § 701 *et seq.*

It is understood that the judicial review of a decision by the Board to grant an application to establish a savings and loan branch is a narrow one at best, but one, nevertheless, that is necessary in our open society. In reviewing decisions of the Federal Home Loan Bank Board, the courts have not followed the mandate of this Court in *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1971), requiring that a review of administrative agency action be made by conducting a thorough, meaningful, probing, in depth review of the entire administrative record that was considered by the Board at the time of making its decision regarding the branch. It is evident that the Federal Home Loan Bank Board does not believe that its decisions are required to be subjected to the review contemplated in *Overton Park.*

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2. From 1970 to 1975, the number of savings and loan associations branches in the United States increased from 4,318 to 10,518.

In 1975, 767 new branch facilities were approved by the Federal Home Loan Bank Board. An additional 672 were authorized in 1976.

Source: *United States Savings and Loan League 1977 Fact Book,* United States League of Savings Associations (Chicago, Illinois: 1977).

1. WHETHER THE WHOLE ADMINISTRATIVE RECORD REQUIRED BY THIS COURT TO BE REVIEWED PURSUANT TO 5 U.S.C. § 706 INCLUDES THE STAFF RECORDS, OPINIONS, RECOMMENDATIONS, SUMMARIES AND MEMORANDA USED BY THE FEDERAL HOME LOAN BANK BOARD IN MAKING A DECISION TO PERMIT THE ESTABLISHMENT OF A BRANCH SAVINGS AND LOAN ASSOCIATION.

In an action to review the decision of an administrative agency, the Administrative Procedure Act provides that "the court shall review the whole record." 5 U.S.C. § 706. However, concrete, applicable standards as to what actually constitutes "the whole record" have never been formulated by Congress, nor by this Court, and, subsequently, the lack of such standards has been the source of much litigation. In the instant case, the question arises as to whether "the whole record" includes the staff records, opinions, recommendations, and memoranda used by the Federal Home Loan Bank Board in making its decisions concerning applications to establish branch savings and loans. The true nature of these documents may be better understood in light of a view of the Board's procedure in making such decisions.

The Board's procedure in evaluating and reaching a decision on an application by a savings and loan association for a branch facility is largely based on prime consideration of the reports, opinions, recommendations, and memoranda prepared by the staff of the agency. A Supervisory Agent takes the application for the branch facility, as well as any applicable protests filed by other area savings and loan associations. The Agent may hear oral argument if he deems such a hearing necessary, and generally visits the site in issue. The Supervisory Agent then prepares

a report with recommendations to the Board concerning either approval or disapproval of the application, which he submits to the Office of Industry Development. The Office of Industry Development transmits the application to the Office of Examinations and Supervision and the Office of General Counsel for their comments as well. Then a digest is prepared by the Office of Industry Development which summarizes all the staff recommendations, the positions of the interested parties, and its own conclusions and recommendations for action on the application.

Obviously, the Board's procedure is an informal investigatory process which lacks trial attributes in that no formal findings of fact or conclusions of law are reached by the Board. Several hundred pages of material presented in the application, protests, and hearings are sifted out and condensed by Board staff members. The Board itself receives these condensations of material from the various offices as well as the digest prepared by the Office of Industry Development. It is this group of documents that the Board considers in reaching its decision. Thus the Board does not consider the entire administrative record, but rather bases its decision on the capsule summaries prepared by its staff members, receiving only what the staff feels are important factors for the Board to consider when making its decision.

The question then arises whether these staff-prepared documents constitute part of "the whole record" which the courts must consider in judicial review of administrative action. A set standard by which the courts can measure "the whole record" has not been established and thus it seems that "the whole record" can be anything the Board wishes it to be.

This Court's interpretation of the Administrative Procedure Act, and particularly the "whole record" concept in 5 U.S.C. § 706, appears in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). Dealing with the Department of Transportation and judicial review of the actions thereof, this Court stated that in order to conduct a "thorough, probing, in depth review",

> [t]hat review is to be based on the full administrative record that was before the Secretary at the time he made his decision. 401 U.S. at 420.

Although this statement in *Overton Park* should serve to clarify the "whole record" standard, the uncertainty remains at least as far as the Board is concerned. Clearly the staff reports were the only documents before the Board at the time it made its decision. However, the Board claims an absolute privilege in the documents, fearing that disclosure of the reports might hinder the Board's efficiency or prevent a full, frank interaction between those in the decision-making process. Since the staff reports comprise an integral part of the Board's decision-making process, they should be reviewed as a part of the "whole record" to insure accuracy and to guard against any abuse of discretion.

The blatant disparity in application of the "whole record" concept is clearly demonstrated when considering the Federal Home Loan Bank Board and the Comptroller of the Currency and the manner in which each agency treats the record that is developed between the hearing and the final decision on a branch application. The Board and the Comptroller of the Currency are sister agencies which are very similar in their purpose and structure, yet very dissimilar in their interpretation of what constitutes the full administrative record for purposes of judicial review of the branch application procedure.

The policy of the Comptroller of the Currency in such a case is outlined in *First, National Bank of Fairbanks v. Camp*, 465 F.2d 586 (D.C. Cir., 1972). The procedure in processing branch applications to the Comptroller of the Currency is virtually identical to the procedure used by the Board. Applications and protests are received by the Comptroller, a hearing is held if deemed necessary, and the hearing record, with the data submitted by the applicant and protestants, is compiled in a "public file". The "public file" is then supplemented with recommendations from various members of the hearing panel and the staff of the Comptroller of the Currency. *Id.* at 589-591. On judicial review of the decision of the Comptroller of the Currency, both the District Court and the Court of Appeals had before them the "public file" as well as the recommendations of the Director of the Bank Organization Division, and the recommendations of two Deputy Controllers. Also included in the record before the courts were documents concerning reconsideration of the Comptroller's decision including letters by the Regional Comptroller and recommendations of Deputy Comptollers and the Director of the Bank Organization Division. The Court of Appeals was "extremely careful in scrutinizing the administrative record" (*Id.* at 597) and used the staff recommendations and opinions rather frequently in formulating its decision, referring to such analysis no fewer than sixteen times.

The courts have agreed that staff opinions and recommendations do indeed comprise an integral part of the "whole record". In *First National Bank of Fayetteville v. Smith*, 508 F.2d 1371 (8th Cir., 1974), *cert. denied*, 421 U.S. 930 (1975), judicial review of a number of individual memoranda, prepared by bank examiners and similar in content to the Board's staff reports, was in question. The court granted discovery of the documents and stated:

> All of the above described documents together with the transcript of the administrative hearing constitute the record which we must consider. *Id.* at 1376.

Despite this, the Federal Home Loan Bank Board refuses to accept the standard as other agencies have done.

The United States District Court for the Eastern District of Wisconsin has applied the *Overton Park* test to judicial review of decisions of the Federal Home Loan Bank Board. In *Community Savings and Loan Association v. Federal Home Loan Bank Board*, 68 F.R.D. 378 (E.D. Wisc., 1975), the facts were essentially identical to those in the instant case.

Based on such facts, the District Court found, first of all, that the privilege asserted by the Board for its staff recommendations and opinions is not absolute and that such disputed items are properly subject to discovery. *Id.* at 381, 382.

Moreover, the court likened the Board's actions in proceedings such as those in the instant case to those of the Comptroller of the Currency and asserted that the status of so-called "privileged" documents and the standards of discovery thereof should be the same for each agency. As observed by the Court in the *Community Savings* decision, the Comptroller has adopted a policy of full disclosure and has been given a "cross-precedential" status with regard to the Board. *Id.* at 382.

The Court in *Community Savings* adopted the standard of review as established in *Overton Park* holding that:

> [i]n order for this Court to determine whether or not the Board considered these factors [need for the branch, whether there is a reasonable probability of its usefulness and success, and whether the branch

can be established without undue injury to existing institutions], the Court must have before it *the same information which was before the agency decision-maker at the time he or she reached the decision in question. This means that the Court must examine the information which the Plaintiffs seek to discover.* *Id.* at 383. (emphasis added).

The Court granted Plaintiff's motion for discovery, holding that:

> [The Court's] scrutiny of the information in question would be greatly aided by an adversary presentation of the issues. The role of the Court in our judicial system is to reach decisions after evaluating the evidence presented by both sides. Therefore *it could best be determined whether the Board considered the requisite issues after hearing the arguments of counsel on this subject. To accomplish this it is necessary that Plaintiff's attorneys be allowed to examine the information which they request under a protective order.* *Id.* at 383. (emphasis added).

The *Community Savings* decision is presently being brought before the United States Court of Appeals for the Seventh Circuit in *Mutual Savings and Loan Association of Wisconsin v. Federal Home Loan Bank Board* and is not yet docketed. *The Mutual Savings* case has been combined with *Community Savings* on the District Court level.[3]

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3. Another case in the District Court for the Eastern District of Wisconsin has adopted the *Community Savings* approach. *City Federal Savings and Loan Association v. Federal Home Loan Bank Board*, No. 75-C-343 (E.D. Wisc., 1977) was decided on grounds other than discovery of "privileged" documents. However, based on facts which were very similar to those in *Community Savings* and the instant case, the District Court granted City Federal's motion to produce the very same type of documents as those sought here. The *City Federal* case is currently pending in the United States Court of Appeals for the Seventh Circuit, Case No. 78-1038.

It seems apparent that pertinent staff reports are an integral portion of the administrative record under judicial review. Congress has recognized the need for the inclusion of all documents in the administrative record for judicial review of administrative action and has attempted to meet that need with the Administrative Procedure Act. The Board has attempted to repeal the "whole record" requirements of Congress by delineating in each case that part of the record the court is to review. The Courts have held from *U. S. v. Reynolds* to the present that the whole record is to be reviewed.

> Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. *U. S. v. Reynolds*, 345 U.S. 1 at 9, 10 (1953).

Therefore, the Board's staff opinions and recommendations should be required to be reviewed by the courts in that they clearly constitute an important part of the "whole record" which should be provided to the reviewing court pursuant to the Administrative Procedure Act.

2. WHETHER THE DISTRICT COURT CAN CONDUCT A "THOROUGH, PROBING, IN DEPTH REVIEW" OF THE ACTION OF THE FEDERAL HOME LAND BANK BOARD IN GRANTING PERMISSION TO ESTABLISH A BRANCH SAVINGS AND LOAN ASSOCIATION WITHOUT EXAMINING ALL THE FACTORS AND INFORMATION THAT WERE CONSIDERED BY THE BOARD IN MAKING ITS DECISION.

Of great concern to the Petitioner is the failure of the courts to follow the requirements imposed by the Administrative Procedure Act in reviewing decisions of the Federal Home Loan Bank Board.

The Administrative Procedure Act, 5 U.S.C. § 706, provides:

"... The reviewing court shall—

(2) Hold unlawful and set aside agency action, findings and conclusions found to be—

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

In making the foregoing determination, the court shall review the *whole record* or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." (emphasis added).

This court in the landmark case of *Citizens to Preserve Overton Park v. Volpe, supra,* should have put to rest any question that the "whole record" as used in the Administrative Procedure Act goes beyond the mere factual input and final decision by an agency. In that case, the Supreme Court took Congress at its word in deciding that the basis for review required by Section 706 was the "whole record" when it held:

"Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the *full administrative record that was before the Secretary at the time he made his decision.* But since the base record may not disclose the *factors that were considered* or the Secretary's *construction of the evidence,* it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard." 401 U.S. at 420 (citations omitted; emphasis added).

The Supreme Court, therefore, has given clear meaning to the requirement that a reviewing court engage in ". . . a thorough, probing, in depth review." *Id.* at 418. Despite the clarity of this statutory language and the interpretation of this Section by the Supreme Court, the Federal Home Loan Bank Board, as discussed earlier, insists that staff recommendations, opinions, and other internal data that are used by the Board in making its decision do not represent any part of the administrative record.

The general policy of placing before the reviewing court all of the information that the agency decisionmaker had was specifically applied by statute to the judicial review of administrative actions. The Administrative Procedure Act requirement that the court review the "whole record" is nothing less than a continuation of this policy of full disclosure for the need of in depth judicial review.

This general policy was crystallized to a crisp statutory command which dictates that judicial review should be no more a game of blindman's bluff than a trial should be. This is a policy underlying the Supreme Court's unrelenting emphasis upon a review of the "whole record" as enuncited by *Citizens to Preserve Overton Park v. Volpe, supra.*

Therefore, nothing less than a careful examination of all information, data, evidence and documents before the Board by the Court could satisfy this standard of review.

In applying these policies to the present controversy, it is well to keep in mind that the Board makes its decision on a branch office application at the conclusion of an informal investigative procedure: there is no public adjudicatory hearing as provided by 5 U.S.C. §§ 556 and 557. There is no cross examination of witnesses, no right to subpoena witnesses, no right to have depositions ordered, there is no development of a litigation type of

evidentiary record. Since the Board's action is not based upon a public adjudicatory hearing, it is not subject to review under the "substantial evidence test" nor is there provision for "de novo review". *Overton Park v. Volpe, supra*, at 414-15; and *Camp v. Pitts*, 411 U.S. 138 (1973).

Instead, the Board's investigative procedure is informal and casual. The applicant and protestants submit their positions, whether fact, opinion or conjecture; the part of the record the Board is willing to produce. The Board's staff then edits and distills this information in its various reports and adds its construction of the evidence, and information from field reports; the part of the record the Board is unwilling to produce. It is upon these staff documents that the Board reaches its decision on a particular application. These documents are in reality the only record before the Board. The Board decision is issued as a conclusory resolution.

Neither the public portion of the record nor the Board's bare resolution allows a reviewing court to engage in "a through, probing, in depth review" which will "disclose the factors which were considered or the construction of the evidence" as required by *Overton*. Requiring the F.D.I.C. to produce its internal file, Judge Sharp declared:

"The Court reasoned it would be impossible to determine whether the Board considered all of the relevant factors without examining the material the Board considered." *Washington Mutual Savings Bank v. F.D.I.C.*, 347 F. Supp. 790 at 793 (W.D. Wash., 1972), *aff'd*, 482 F.2d 459 (9th Cir., 1973).

In the *Community Savings* case, Judge Reynolds questioned Mr. Simon, counsel for Board:

> THE COURT: Well, you can always come up with some evidence to support any decision, but the

> issue is that you're not subject to review. Has any court ever reversed you?
>
> MR. SIMON: No, we've never been reversed on a branching decision.
>
> THE COURT: As long as the law is construed that way, I don't think you ever will be. Record at 39, *Community Savings and Loan Association, supra.*

What kind of review can a court undertake when it does not have before it all of the facts, materials, and documents that were before the decisionmaker?

Query: What if a portion of the record that was not reviewed contains negative recommendations by internal experts of the "Agency", or staff findings that contradict the information contained in the so-called "public record"? The possibility exists for those staff reports to show conflict of interest problems between an applicant and the Board. Certainly there is no method for a reviewing Court to determine whether error of this nature exists unless it has examined these documents and the entire record. It is not important that the decision of the Board is sustained by the reviewing court or reversed. What is important is the court be permitted and actually does conduct the type of review as contemplated by Administrative Procedure Act and further emphasized in the *Overton Park* decision so that due process is achieved in administrative matters.

Without an examination of the entire record that type of judicial review can never be made.

3. WHETHER A "RATIONAL BASIS" EXISTS FOR A DECISION OF THE FEDERAL HOME LOAN BANK BOARD TO PERMIT THE ESTABLISHMENT OF A BRANCH SAVINGS AND LOAN ASSOCIATION WHEN THE RECORD REVIEWED CONTAINS NO PROBATIVE, INDEPENDENT EVIDENCE TO SUPPORT THE DECISION AND THE BOARD DOES NOT PROVIDE REASONS FOR THE DECISION.

The review of administrative agency action breaks down into two distinct evidentiary tests. The "substantial evidence test" and the so-called lesser test or "arbitrary and capricious standard". *Camp v. Pitts, supra.*

Decision of the Federal Home Loan Bank Board relative to applications to establish branch savings and loan facilities fall into the latter test.

A reviewing Court must find some "rational basis" to support the Board's conclusory resolution granting or denying the application.

However, reviewing courts in general and the instant District and Circuit courts have been unable to firmly establish what is meant by the "rational basis" test.

Numerous phrases have been used to describe the "rational basis" test in administrative decisions regarding national banks as regulated by the Comptroller of Currency and federal savings and loan associations as regulated by the Federal Home Loan Bank Board.[4]

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4. In *First National Bank of Fairbanks v. Camp*, 326 F. Supp. 541, 544 (D. D.C., 1971), *aff'd*, 465 F.2d 586 (C.A. D.C., 1972), *cert. denied*, 409 U.S. 1124 (1973), the Comptroller's action in approving a branch office was held valid if "there was some rational basis for the action taken." In *Klanke v. Camp*, 327 F. Supp. 592, 594 (S.D. Texas, 1971), action of the Comptroller was described

(Continued on following page)

However, it is clear that in the instant case and generally, the Federal Home Loan Bank Board refuses to provide any rational explanation for its conclusionary resolution.

The Board believes that the only so-called "public record" should be thrown to the Court and the Court should determine for itself what rational basis was utilized by the Board. This the Board urges even though its decision may have been made upon information and recommendations never given to the court for review.

In both *Overton Park* and in *Camp v. Pitts*, the Court required that there at least be some explanation. The Board steadfastly clings to the concept that a Court should not substitute its opinion for that of an administrative agency and yet contradicts that very concept by allowing the Court to guess at the rational basis used by the Board in arriving at its decision. In the instant case, the record is devoid of any independent probative evidence to support the Board's decision. The Board should be required to disclose the reasons for its decision rather than the conclusionary resolution that it produced. This is even more critical inasmuch as the Board failed to permit the Court to review the entire administrative record but only those portions of the record that it deems public. This secret reasoning by the Board does not create either public or industry confidence.

Footnote continued—

to be appropriate unless it was "totally devoid of any rational foundation". In the earlier case of *Klanke v. Camp*, 320 F. Supp. 1185, 1188 (S.D. Texas, 1970), similar judgment of the Comptroller was characterized as requiring "merely upon evidencing a minimal basis in reason for his denial." And again in *First National Bank of Fayetteville v. Smith*, 508 F.2d 1371 (C.A. 8, 1974) the court upheld the decision since it ". . . was certainly not without some support in the record".

CONCLUSION

The questions presented are of great and urgent significance to the savings and loan industry. The importance of defining the scope and standards for judicial review are evidenced by the continual attention given the subject by this court.

A review of this action would provide an opportunity to further enhance this court's decision in *Overton Park* and *Camp v. Pitts* not only as the standard of judicial review should be applied to the Federal Home Loan Bank Board, but for other administrative agencies as well, and is therefore appropriate for the exercise of this court's discretionary jurisdiction.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

ORDER OF COURT OF APPEALS FOR SIXTH CIRCUIT

(Filed January 4, 1978)

No. 76-1886

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MECHANIC'S BUILDING AND LOAN ASSOCIATION,
Plaintiff-Appellant,

vs.

FEDERAL HOME LOAN BANK BOARD, CARDINAL FEDERAL SAVINGS AND LOAN ASSOCIATION and THOMAS R. BOWMAR, *et al.*,
Defendants-Appellees.

ORDER

Before WEICK and KEITH, *Circuit Judges*, and CECIL, *Senior Circuit Judge.*

Upon consideration of the briefs, appendix and arguments of counsel we are of the opinion that the order of the Federal Home Loan Bank Board (Board) granting to Cardinal Federal Savings and Loan Association authority to open a branch office, was in no sense unreasonable, arbitrary, capricious or discriminatory. There was a rational basis for the Board's decision in granting the permit.

We find no error in the denial by the District Court of plaintiff's motion for discovery which included internal records and reports of the Board's staff and of its supervisory agent. Three pages of factual summaries were prepared in connection with the reports and were voluntarily furnished to plaintiff.

There was no error in granting summary judgment in favor of the defendants.

The judgment of the District Court is AFFIRMED.

Entered by Order of the Court

JOHN P. HEHMAN, *Clerk*
By /s/ GRACE KELLER
Chief Deputy Clerk

ENTRY OF JUDGMENT OF DISTRICT COURT

(Filed April 16, 1976)

No. C-1-75-133

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MECHANIC'S BUILDING AND LOAN COMPANY,
Plaintiff,

vs.

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Defendants.

JUDGMENT ENTRY

This matter came before the Court on the cross-motions for summary judgment of the plaintiff, Mechanic's Building and Loan Company and defendants Federal Home Loan Bank Board, Garth Marston, Grady Perry, Jr., Lawrence B. Muldoon, and Cardinal Federal Savings and Loan Association pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons stated in Memorandum on Cross-Motions for Summary Judgment filed the same day, the Court denies, plaintiff's motion for summary judgment but finds that the motions for summary judgment of each and every defendant are well-taken and summary judgment is hereby granted for each and every above-named defendant.

IT IS SO ORDERED.

/s/ TIMOTHY HOGAN
United States District Judge

MEMORANDUM OPINION OF DISTRICT COURT ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

(Filed April 16, 1976)

No. C-1-75-133

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MECHANIC'S BUILDING AND LOAN COMPANY,
Plaintiff,

vs.

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Defendants.

MEMORANDUM ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this case the plaintiff, Mechanic's Building and Loan Company, challenges the approval of defendant Federal Home Loan Bank Board (Board) of an application of defendant Cardinal Federal Savings and Loan Association of Cleveland (Cardinal) to establish a branch in Richland County, Ohio in the Village of Ontario near U. S. Route 30 and across from the Richland Mall Shopping Plaza. Also named as defendants are the supervisory agent, the chairman and the members of the Federal Home Loan Bank Board. After a hearing held on June 26, 1975, Judge Carl B. Rubin denied plaintiff's motions for a temporary restraining order and preliminary injunction and Cardinal was authorized to proceed with the opening of a temporary branch office. However, Judge Rubin did re-

strain Cardinal from making any permanent improvements on the site, conditioned upon the plaintiff posting a $25,000 surety bond. As plaintiff never posted the bond, this Court dissolved the temporary injunction on January 5, 1976. Also on January 5, 1976, the Court affirmed the Magistrate's Discovery Decision and Order on plaintiff's Motion to Produce and denied plaintiff's motion for the certification of the discovery issue and a continuance.

The cause is now before the Court on the cross-motions of the parties for summary judgment. The parties have submitted substantial memoranda, exhibits, and affidavits supporting their respective positions and a hearing on the cross-motions was held on April 14, 1976. We believe the cause is suitable for summary judgment and that summary judgment should be granted in favor of all defendants.

FACTS

We find the following facts from the extensive record in this case. On April 6, 1973, the West Side Federal Savings and Loan Association of Fairview Park, Ohio (West Side) filed an application with the Board to establish a branch savings and loan office at the same location which is the subject of the present suit. The plaintiff and other area savings and loan associations protested this application and on October 29, 1973, the Board denied the application.

On December 31, 1973, West Side and the Second Federal Savings and Loan Association of Cleveland, Ohio merged and formed Cardinal Federal Savings and Loan Association, one of the defendants herein. Cardinal has become the largest federal savings and loan association in the State of Ohio.

On September 27, 1974, Cardinal filed its application to establish a branch office at the location set forth above. Once again plaintiff and other area savings and loan associations protested the application and a hearing was held on the application on January 9, 1975. At the hearing Cardinal presented evidence in support of its application and the plaintiff and other savings and loan associations presented evidence in opposition to the application.

On March 12, 1975, the Board approved Cardinal's application.[1] The Board notified plaintiff and other interested savings and loan associations on March 24, 1975. Plaintiff filed the present action on April 17, 1975, claiming that the Board's approval was "unreasonable, arbitrary, capricious and discriminatory."

As stated above, the approved branch is located across from the Richland Mall on land previously purchased by Cardinal. The Richland Mall is a large, covered shopping plaza located in or near the Village of Ontario. Sales at the Mall grew by 12 % from 1973 to 1974. At the

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1. The decision of the Board was stated in a resolution as follows:

> WHEREAS, the Board has considered the complete record of the cause and the merits of the application of Cardinal Federal Savings and Loan Association, Cleveland, Ohio, dated September 26, 1974 for permission to establish a branch office at, or in the immediate vicinity of the Intersection of U. S. 30-N and Lexington-Springmill Road, Ontario, Richland County, Ohio; and
>
> WHEREAS, it is determined that a necessity exists for such a branch office, that there is a reasonable probability of its usefulness and success, and that it can be established without undue injury to properly conducted existing local thrift and home-financing institutions:
>
> IT IS HEREBY RESOLVED, that said application is hereby approved; provided that the exact location of such branch office is approved by this Board before such branch office is established; and provided further that such branch office is established not later than twelve months from the date of this approval.

time of Cardinal's application in 1974 there was only one savings and loan association serving the Richland Mall and it was located within the Mall itself. There were no other savings and loan associations within a four mile radius of Cardinal's branch office.

THE BOARD'S PROCEDURES

The Board's procedures governing branch applications are set out in 12 U.S.C. § 1464(e), 12 C.F.R. §§ 545.14 and 556.5. For a Savings and Loan Association to establish a branch, it must submit an application to the Board which gives information on the necessity and reasonable probability of usefulness and success of the proposed branch. The application must also include information showing that the branch may be established without undue injury to local institutions in the proposed service area.

Once the application is deemed complete, the applicant must give notice of its filing in a newspaper of local circulation. Within ten days after publication of the notice, any person may file written material either in support of or in opposition to the application. The applicant is then given an additional 15 days to submit information supporting its position.

Within ten days after the expiration of the time for submitting written material, any protestant may request an oral argument on the merits of the application. The Board's Supervisory Agent must then give at least ten days notice of the time and place of the argument to all persons who have submitted any filing regarding the application.

At the oral argument, which is conducted by the Supervisory Agent (or someone designated by the Board), parties maybe represented by counsel, and each side has

a minimum of one hour to present their arguments. Arguments "should be based" on the written information already submitted, but the Supervisory Agent can admit new material if he finds it constitutes "substantive new matter." A transcript of the proceedings is made and included in the application file. Recommendations are made by the Supervisory Agent to the Board which then approves or disapproves the application.

SUMMARY JUDGMENT

We find that all of the above procedures were complied with by Cardinal and the Board. Furthermore, we note that the application, the protests to it, the applicant's reply to the protest, and the transcript of the oral argument are a part of the record before this Court. The matter is now ripe for judicial determination since each party has moved for summary judgment and thoroughly briefed their legal contentions. *Elm Grove Sav. & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 391 F. Supp. 1041, 1043 (E.D. Wis. 1975); *Benton Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 365 F. Supp. 1103, 1104 (E.D. Ark. 1973).

Plaintiff contends in its motion for summary judgment that this Court should apply the "substantial evidence" test in determining whether the Board had sufficient evidence before it to make the decision it made on the application. Plaintiff also argues that the Board's decision is invalid because the Board did not make any findings or provide an opinion for its decision.

The Board's determinations on branch applications are issues committed to the sound discretion of the agency. While that discretion is not unlimited, this Court has been unable to find a single decision holding that the appropriate standard of review to be employed in examining the

Board's decision on a branch application is the substantial evidence test. The Administrative Procedure Act, 5 U.S.C. § 706(2)(E), provides that a reviewing court should employ the substantial evidence standard only in certain enumerated instances (such as when there is an agency hearing provided by statute) and it has been held repeatedly that section 706(2)(E) does not apply to the Board's branching decisions. Rather the applicable standard of review is the "rational basis" test and the Court's inquiry is thus limited to whether the Board in granting the application before it acted arbitrarily or capriciously or abused the broad discretion vested in it. *Camp v. Pitts*, 411 U.S. 138 (1973); *First Nat'l Bank of Fayetteville v. Smith*, 508 F.2d 1371 (8th Cir. 1974); *Bridgeport Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 307 F.2d 580 (3d Cir. 1962), *cert. denied*, 371 U.S. 950 (1963); *Bank of Ozark v. Federal Home Loan Bank Bd.*, 402 F. Supp. 162 (E.D. Ark. 1975); *Elm Grove Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 391 F. Supp. 1041 (E.D. Wis. 1975); *Merchants & Planters Bank of Newport v. Smith*, 380 F. Supp. 354 (E.D. Ark. 1974), *aff'd* 516 F.2d 355 (8th Cir. 1975).

Nor is the Board required to issue findings of fact, conclusions of law, or an opinion explaining its branch application decisions. *Camp v. Pitts, supra; First Nat'l Bank of Fayetteville v. Smith, supra*; *Bank of Ozark v. Federal Home Loan Bank Bd., supra*; *Elm Grove Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., supra; Lyons Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 377 F. Supp. 11 (N.D. Ill. 1974).

Finally, plaintiff argues at great length that the record before the Board did not even satisfy the "rational basis" test, especially as to the requirement that the branch be established without "undue injury to properly conducted existing local thrift and home-financing institutions," and

therefore the Board's decision was arbitrary and capricious. Plaintiff also points to the fact that West Side's branch application was denied in 1973, yet Cardinal's application for the same location was accepted in 1975, and argues that the Board's decision was arbitrary because the economic factors surrounding the particular branch location did not change in that period of time.

As was stated in *Elm Grove Sav. & Loan Ass'n v. Federal Home Loan Bank Bd., supra*:

> . . the governing regulatory test is not mere "injury" to the plaintiff but "undue injury." In focusing on this criteria, the board was required to balance any possible injury to the plaintiff against the benefit to the residents of the developing service area, and to persons using the regional shopping center, from an additional savings and loan facility. 391 F. Supp. at 1044.

Furthermore, Judge Rubin, in the Court's Order on plaintiff's motion for a temporary restraining order, examined plaintiff's argument of "undue injury" and found that

> There is no doubt that the entrance of an additional savings and loan company into Richland County would create some damage to the plaintiff. Whether such building and loan entered by action of the defendant in this case or by the action of the appropriate regulating authority of the State of Ohio, is not significant. The regulatory standard is one of "undue injury." Irreparable damage in the equity sense in this instance must be in terms of the regulatory concept of undue injury. The testimony and argument of the plaintiff indicated only that the injury would be that customary and expected in the building and loan industry where an additional competitor enters the area.

Although Judge Rubin was considering the question of undue injury in terms of the necessity for a temporary restraining order, we similarly believe that when the Board was considering Cardinal's application there was little doubt that establishing a branch across from the Richland Mall would cause plaintiff and other savings and loan associations to lose some customers. However, we also believe that the Board weighed the effect of the potential competition of Cardinal's branch with existing savings institutions against the public's need for an additional savings and loan facility at the location and concluded that the injury to existing savings facilities would not be "undue." Given the agency's expertise in this area, this Court cannot find that such conclusion was arbitrary or capricious.

We also cannot agree with plaintiff's contention that the conditions had not changed from the time of West Side's application to the Board to Cardinal's application. There is sufficient evidence in the record of growth in sales at the Mall and savings potential for the area. In addition, the Board could reasonably have found that a branch across from the Mall was now warranted because of the difficulty of obtaining mortgage loans from area institutions, increased sewer service development and increased traffic flow in the area, and the fact that two local savings and loan associations had subsequently applied to branch in the Mansfield area.

In short, this Court cannot say from the record before us, that the Board acted arbitrarily or capriciously or abused its discretion in granting the application.

Accordingly, the plaintiff's motion for summary judgment is hereby denied. The defendants' motions for summary judgment will be granted.

/s/ TIMOTHY HOGAN
United States District Judge

ORDER OF DISTRICT COURT ON PENDING MOTIONS DENYING MOTION OF MECHANIC'S BUILDING AND LOAN TO RECONSIDER DECISION AND ORDER OF MAGISTRATE

(Filed January 5, 1976)

C-1-75-133

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MECHANIC'S BUILDING & LOAN CO.,
Plaintiff,

v.

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Defendants.

ORDER ON PENDING MOTIONS

The Court's attention has been invited to this relatively youthful, but voluminous, record and sundry pending motions by letters from counsel dated November 26, 1975 and December 12, 1975. The letters are transmitted to the Clerk herewith for filing (not docketed) in this C-1-75-133. The undersigned regrets that he has not been able, by reason of the press of the criminal docket, to earlier acknowledge the letters.

No oral or evidentiary hearing or conference is advisable or necessary.

The Court has examined the record in this case to the extent necessary to dispose of the following matters. On such consideration—

—A—

The temporary injunction contained in this Court's order of June 27, 1975 has never become effective and should be dissolved as a matter of record.

The order not only fixed a bond but "directed" the "posting" of a "surety bond" and is as clear as could be. See Rule 65 and 65(a). The plaintiff has had more than ample opportunity to comply with the Court's order.

ORDERED that the temporary injunction be and it is dissolved.

—B—

The Court has "re"-considered the Magistrate's Discovery Decision and Order on Plaintiff's Motion to Produce, entered November 12, 1975, and the briefs pertinent thereto. That decision and order should be and it is confirmed for the reasons set forth in that Decision, which are adopted. The Order, including the declination (page 4 thereof) is adopted and confirmed. SO ORDERED.

—C—

There is no warrant at all for the alternate motion of the plaintiff for a certification of the discovery issue and a continuance. Both requests are denied.

Plaintiff may have 30 days within which to file its opposition (briefs and affidavits) to the defense summary judgment motion(s) and/or file a summary judgment motion (with appropriate briefs and affidavits) and the matter will thereafter be assigned for hearing on whatever summary judgment motions are then pending.

Happy New Year!

/s/ TIMOTHY HOGAN
United States District Judge

DECISION AND ORDER BY MAGISTRATE DENYING MOTION OF MECHANIC'S BUILDING AND LOAN ASSOCIATION FOR ORDER TO PRODUCE DOCUMENTS

(Filed November 12, 1975)

Civil Action No. C-1-75-133

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MECHANIC'S BUILDING AND LOAN COMPANY,
Plaintiff,

vs.

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Defendants.

DECISION AND ORDER ON PLAINTIFF'S MOTION TO PRODUCE

Among its activities, defendant Federal Home Loan Bank Board (hereafter "Board"), approves or disapproves branch applications for federally chartered savings and loan associations. In Board Resolution No. 75-258, dated March 12, 1975, the Board authorized defendant Cardinal Federal Savings & Loan Association (hereafter "Cardinal") to establish a branch office in Ontario, Ohio. Plaintiff brings this action seeking review by this Court of the decision of the Board, and an injunction against the establishment of the Cardinal branch.

Plaintiff has made demand upon defendant for the production of all summaries, findings, written statements,

or documents, prepared by the staff of the Board in connection with the branch application of Cardinal. Defendant says that two documents are actually in question. The first is a report prepared by defendant Lawrence B. Muldoon, supervisory agent for the Board in Cincinnati which contains the agent's analysis of the record and his recommendation as to whether the subject branch application should be approved. The other document is a one-page report prepared by the office of Industry Development of the Board containing the Washington staff's analysis of the application and its recommendation on the branch application. Defendant refuses to produce these documents, claiming executive privilege. Three pages of factual summaries were prepared in connection with the two reports. Defendants have removed these pages from controversy by attaching them to their memorandum in opposition to the motion. Plaintiff has brought this motion to compel production under Rule 34 of the Federal Rules of Civil Procedure. We overrule the motion.

The justification for executive privilege, in the aspect with which we are here dealing, is to prevent interference with administrative decision making and to encourage such decision making after a full, frank and free interchange between those involved in the process within the agency. *Kaiser Aluminum and Chemical Corp. v. United States*, 157 F.Supp. 939, 945-946 (Ct. Claims 1958), approved in *EPA v. Mink*, 410 U.S. 73, 86-87 (1973). See also *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150-151, 44 L.ed.2d 29 (1975). Clearly the reports here sought are within the privilege.

But *Kaiser* teaches that the privilege is not absolute. Plaintiff urges that this is a case in which the privilege should not apply and in support of its thesis, cites *Community Savings & Loan Association v. Federal Home Loan*

Bank Board, an unreported decision by the U. S. District Court in the Eastern District of Wisconsin, CA No. 73-C-121. In *Community Savings*, the Court allowed discovery of documents such as those here in issue because it concluded that "no harm will befall the consultative process of the Board if the documents in question are revealed to plaintiffs." The Court believed that this settled the matter because in its view *Kaiser* held that the privilege should not be applied where production of the contested document would not, as a matter of fact, be injurious to the consultative functions of an agency. A basis for the Court's belief in *Community Savings* was that there has been no claim that the Comptroller of the Currency lacks open and honest discussion regarding its decisions, notwithstanding that a number of cases reveal that the Comptroller has revealed, voluntarily or pursuant to court order, information similar to that sought by plaintiffs in this action.

In addition, the court in *Community Savings* stated as a positive reason under the facts of that case, for the granting of the discovery, the fact that "the agency has completely changed its position on an application within a relatively short period of time," and the court felt that "public confidence in the soundness of the decision making process will be promoted by allowing plaintiffs to see the information they request" in view of this fact. Further the Court said that it must have before it the same information which was before the agency decision maker in order for it to make a determination whether or not the Board considered the factors which it is required to consider on a branch application.

If one accepts that there is a rational basis for the application of executive privilege to interagency pre-decisional opinions and recommendations of subordinates, as

we do, there is nothing in this case which persuades us that the privilege ought not to apply to the documents here in question. That the Board changed its mind as to whether or not a branch should be authorized from negative to positive in a relatively short period of time is a fact which will have its place in the presentation to the Court on the merits. It suggests nothing to us as a reason for allowing the discovery here sought.

Nor do we think that a contrary recommendation by subordinates which was rejected by the Board in reaching its decision, if such was the case, is something that the Court needs to have before it in deciding whether the Board acted arbitrarily and capriciously. Indeed, the whole purpose of the privilege in the first place is to allow free discussion within an agency with free expressions of difference of attitude without fear that such differences will come into public view. If an agency feels that such protection is of worthwhile value for its decision making process, it may claim the privilege as it has done here, and we see no reason why the privilege should not be extended. Whether or not the Board acted arbitrarily or capriciously must be determined in the light of relevant facts which the Court will have before it as it approaches the case; we do not believe that the opinions and recommendations in question are relevant facts.

The foregoing should suffice to illustrate why we decline to follow the *Community Savings* case except in one respect. That is the point, relied upon to a significant extent by the Court in *Community Savings*, that a number of cases show that the Comptroller of the Currency voluntarily discloses internal staff memoranda prepared in connection with branch applications by national banks, and the Court did not feel that this interfered with the effectiveness of the decisional process of the Comptroller's

office. It is our view that the defendant here is entirely within its rights in following a different course and claiming the privilege. See *United States v. Provident Bank*, 41 F.R.D. 209 (E.D. Pa. 1966).

Plaintiff as part of its motion suggests that we must at least examine in camera the subject documents "in order to determine whether they are within the exemption of the Freedom of Information Law." Notwithstanding the agreeability of the Board to an in camera inspection, we decline such inspection. The Board by its acting chairman has filed an affidavit which adequately describes the documents sought. (See ¶10 Marston affidavit.) We may rely upon that affidavit in concluding that the documents contain matters protected by executive privilege. *Ash Grove Cement Company v. F.T.C.*, 371 F.Supp. 370 (D.C. D.C. 1973). Moreover the documents here in question are exempt from the operation of the Freedom of Information Act, as expressly provided by statute at 5 U.S.C. § 552 (b) (5). See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975).

Plaintiff's motion is denied.

SO ORDERED.

/s/ BURTON PERLMAN
United States Magistrate

RESOLUTION BY FEDERAL HOME LOAN BANK BOARD APPROVING APPLICATION OF CARDINAL FEDERAL SAVINGS AND LOAN ASSOCIATION

(March 12, 1975)

FEDERAL HOME LOAN BANK BOARD

No. 75-258
Date: March 12, 1975

WHEREAS, the Board has considered the complete record of the cause and the merits of the application of Cardinal Federal Savings and Loan Association, Cleveland, Ohio, dated September 26, 1974, for permission to establish a branch office at, or in the immediate vicinity of the Intersection of U.S. 30-N and Lexington-Springmill Road, Ontario, Richland County, Ohio; and

WHEREAS, it is determined that a necessity exists for such a branch office, that there is a reasonable probability of its usefulness and success, and that it can be established without undue injury to properly conducted existing local thrift and home-financing institutions:

IT IS HEREBY RESOLVED, that said application is hereby approved; provided that the exact location of such branch office is approved by this Board before such branch office is established; and provided further that such branch office is established not later than twelve months from the date of this approval.

By the Federal Home Loan Bank Board

/s/ GRENVILLE L. MILLARD, JR.
GRENVILLE L. MILLARD, JR.
Assistant Secretary

STATUTES INVOLVED

5 U.S.C. §702

Right of review.—A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. §704

Actions reviewable.—Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. §706

Scope of review.—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.